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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 VIDIVIXI, LLC,

4 Plaintiff,

5 v.

15 CV 7364 (JGK)

6 FRANCIS T. BRADLEY, et al.,

7 Defendants.

8 -----x
9 New York, N.Y.
September 21, 2015
3:00 p.m.

10 Before:

11 HON. JOHN G. KOELTL,

12 District Judge

13 APPEARANCES

14 MATTHEW ADAM PEK

15 Attorney for Plaintiffs

16 RAO LAW GROUP

Attorney for Grattan Defendants

17 BY: SIDDARTHA RAO

18 JEAN LIN, Pro Se Defendant

F9LKVIDM

1 THE DEPUTY CLERK: Vidivixi versus Grattan.

2 All parties, please state who they are, for the
3 record.

4 MR. PEK: Good afternoon, your Honor. Matthew A. Pek,
5 Esq., The Peksquire Group, 387 Grand Street, Suite K203, New
6 York, New York 10002, counsel for plaintiff. Good afternoon,
7 your Honor.

8 THE COURT: Good afternoon.

9 MR. RAO: Thank you, your Honor. Siddartha Rao, Rao
10 Law Group. I'm representing Mark Grattan, who's also here
11 today in court, and the Mark Grattan building and design
12 defendant.

13 MS. LIN: My name is Jean Lin. I'm representing
14 myself. I'm also the sole owner and operator of Jean Lin LLC.

15 THE COURT: Okay. Good afternoon, all.

16 This is a order to show cause. It seeks to bring on a
17 preliminary injunction and it also includes a temporary
18 restraining order. So I'll listen to the parties.

19 An observation: I don't have any papers in opposition
20 to the order to show cause for a preliminary injunction and a
21 temporary restraining order. It's plain that I will set a
22 schedule for the response to the motion papers for a
23 preliminary injunction, a response, a reply, and then set it
24 down for a hearing.

25 So the real issue is the temporary restraining order.

F9LKVIDM

1 The plaintiff alleges that the defendant is using the trademark
2 name Vidivixi and that the defendant has also been effectively
3 siphoning proceeds that should go to Vidivixi, to himself. And
4 there is an issue with respect to certain specific pieces of
5 furniture which I believe Ms. Lin has and which the plaintiff
6 says belongs to the plaintiff and not the defendant. So there
7 is an issue about what happens to that furniture while the
8 preliminary injunction is decided.

9 So the question is: Should there be a temporary
10 restraining order before the preliminary injunction can be
11 decided, and what the extent, if any, of that temporary
12 restraining order should be.

13 Okay, Mr. Pek.

14 MR. PEK: Thank you, your Honor.

15 Actually, I should first note for the record, about an
16 hour ago, maybe two hours ago, I received a phone call from
17 Ms. Lin's corporate counsel, who has advised her in the past on
18 nonlitigation related matters, including the incorporation of
19 her LLC, which was also a defendant here. He has, Aaron
20 Goldberg of Holland & Knight has, given me all assurances, as
21 has Ms. Lin -- from the very first response I received from her
22 after writing my first letter on behalf of my client,
23 effectively terminating the lease and consignment agreement
24 whereby my client was permitted to showcase these five pieces
25 of furniture in Ms. Lin's showroom referred to as Colony -- we

F9LKVIDM

1 have received all assurances that the status quo has been
2 preserved. And Ms. Lin astutely responded to me at the outset
3 that it was her understanding that Vidivixi was a partnership
4 between effectively Francis T. Bradley, one of the plaintiffs,
5 and Mark A. Grattan, one of the defendants, and not solely
6 owned by my client; therefore, pending a court order or mutual
7 resolution between the parties, she would effectively be taking
8 a hands-off position, which is exactly effectively what we
9 would have hoped for.

10 Having said that, and having shared a conversation
11 with Mr. Goldberg, who has advised Ms. Lin in connection with
12 this matter, likely -- and I should just note he is a corporate
13 attorney and I do want to just disclaim that -- that I am
14 confident that, following the procedural history, if you will,
15 that I have just recounted for your Honor, along with my phone
16 call with Ms. Lin's counsel, I do not think a temporary
17 restraining order with respect to those five pieces is
18 necessary pending a hearing on the preliminary injunction.

19 THE COURT: Okay, thank you.

20 Is there any dispute with respect to entering a
21 temporary restraining order that doesn't affect the five
22 pieces, that essentially says that the defendants can't use the
23 name Vidivixi until the preliminary injunction is decided?

24 MR. PEK: Your Honor, that is a separate issue that we
25 in fact do continue today and, as set forth in our papers,

F9LKVIDM

1 believe is necessary, based on quite simply email
2 correspondence and invoices that were discovered by my client
3 not long ago indicating -- now, we don't know whether any
4 transactions have in fact taken place but the mere fact that
5 these invoices bearing the Vidivixi mark, which my client is
6 the sole owner of, and I believe we have included the United
7 States Patent and Trademark Office serial number registration
8 to that effect, that irreparable harm has been suffered and
9 will continue to be suffered so long as any business is done
10 under the name Vidivixi, including, I should mention, the
11 website itself, which was recently reactivated but is beyond my
12 client's control. It's a dicey matter because, to be perfectly
13 frank, Mr. Grattan, as I understand it, by my client,
14 Mr. Bradley, was authorized to register the domain name as the
15 registrant for Vidivixi.com.

16 However, my client has, as with all other things in
17 this business -- and I don't think that there will be a dispute
18 as to opposition to this effect -- financed every nickel and
19 penny of the operation. Nonetheless, my client has no means of
20 access to the domain name itself; it was recently reactivated.

21 But another concern is that there is a click-through
22 mechanism whereby the defendant has a website of his own -- I
23 believe it's Mark Grattan, just his name, eliminating the
24 middle initial or middle name, dot-com, that if you visit it,
25 it's an automatic click-through to Vidivixi.com. That, coupled

F9LKVIDM

1 with the invoice we have discovered and the sales and
2 effectively what we aim to achieve with respect to those
3 invoices at a hearing to be set by your Honor, at your Honor's
4 discretion, is an accounting and, if necessary, a creation of
5 constructive trust or a position of constructive trust for any
6 proceeds that, in our position, we believe would be ill-gotten
7 and should be allocated in accordance with Vidivixi's ownership
8 structure and reflective of the true individuals that do own,
9 or individual I should say, the LLC and the Vidivixi enterprise
10 before it was incorporated.

11 THE COURT: Okay.

12 Let me listen to the defendant.

13 MR. RAO: Yes, your Honor. First, I just want to
14 point out one procedural matter. Plaintiffs' counsel did not
15 serve papers until Saturday, after midnight. He subsequently
16 served exhibits on Sunday. Many of the papers appear to be
17 unsigned, I believe they are missing papers, and I don't even
18 know if I have full notice of what it is that plaintiff has
19 filed because this case was not --

20 THE COURT: Just keep your voice up, please.

21 MR. RAO: Yes, your Honor. I just want to correct a
22 few misstatements.

23 First, there's no trademark for Vidivixi. There is
24 actually no registered mark. Mark Grattan --

25 THE COURT: Maybe you want to go to the podium? It

F9LKVIDM

1 might be easier than bending over.

2 MR. RAO: Sure.

3 THE COURT: Thank you.

4 MR. RAO: Yes, your Honor.

5 We're dealing with a fairly extraordinary fact
6 pattern, where Francis Bradley, the petitioner, and Mark
7 Grattan were partners in a partnership for over a year, held
8 themselves out as partners, signed contracts as partners, sent
9 emails as partners; in fact, the papers were served on Mark at
10 his address at Vidivixi.com. Respondent has always had control
11 over the domain. In fact, the website was originally set up as
12 a mirror to MarkGrattan.com. Respondent designed the logo and
13 all the furniture which is the subject of this TRO. These are
14 facts that are based on documents that I have reviewed,
15 business records of Vidivixi. It's advertised on the website
16 as a partnership and, as I said before, there's no actual
17 trademark.

18 What has happened here is that petitioner, without
19 telling respondent, both filed for a trademark and incorporated
20 an LLC on August 26th, a mere day after Mr. Grattan sent a
21 partnership proposal to Mr. Bradley to try to document the
22 partnership which had existed for year. If I understand
23 petitioner's argument correctly, he is trying to say that the
24 mere filing of an LLC creates an ownership in a mark Vidivixi,
25 that LLC, as I said before, was neither disclosed to Mark

F9LKVIDM

1 Grattan nor is there any basis to assume that it owns the mark
2 Vidivixi.

3 This would be like me filing an LLC application for
4 McDonalds LLC and then serving demand upon McDonalds for their
5 brand, goodwill and profits, and there is no legal basis for
6 that.

7 As far as the preliminary injunction and TRO --

8 THE COURT: I'm sorry, in the papers that the
9 plaintiff submitted, there is an application that was filed for
10 Vidivixi in March of 2015.

11 MR. RAO: Your Honor, that application is still
12 pending. There's been not only no registration but it hasn't
13 even published for opposition. In fact, I have very strong
14 legal grounds to believe it's void, it is an intent-to-use
15 application and was filed on behalf of the wrong party. With
16 intent-to-use applications, they have to be filed on the party
17 actually using the application.

18 Here, the application was filed by Francis T. Bradley
19 LLC, which is claimed as a New York LLC; there is no actual
20 record of Francis T. Bradley LLC on the New York Department of
21 State website. I did a business search and couldn't find any
22 record of it. In any case, it's alleged as a mark of Vidivixi
23 LLC, the application is void ab initio, it hasn't registered,
24 and it hasn't published, it doesn't create any rights.

25 We have an issue here, your Honor, with petitioner's

F9LKVIDM

1 counsel having sent numerous letters threatening legal action
2 if furniture is not returned to him, on the basis of an LLC
3 filing well after the fact and long after both Mark Grattan and
4 Francis Bradley had been in a partnership. That partnership is
5 based on, unfortunately, not an incorporation of a partnership
6 document but several emails and, as I said, the domain
7 Mark@Vidivix.com, with which petitioner corresponded with Mark
8 Grattan on numerous occasions.

9 They employed outside people, as a partnership; as I
10 said, they signed contracts as partners; frequently
11 Mr. Bradley, Mr. Pek's client, was copied on emails where Mark
12 Grattan called himself a cofounder. He at no point objected.
13 This went on for over a year.

14 So, it's fairly extraordinary that Mr. Pek would come
15 into court today on the basis of an LLC filing and attempt to
16 not preserve the status quo but actually upset the status quo
17 and prevent my client from doing what he's been doing for over
18 a year.

19 THE COURT: The plaintiff says that your client
20 established a click-through website so that if there were
21 people who were trying to buy goods from Vidivixi, they were
22 routed to your client.

23 MR. RAO: It's actually the opposite, your Honor.

24 But, first, I want to correct one other statement,
25 which is that there have actually been no sales and no

F9LKVIDM

1 proceeds. Largely, this is because within the designer
2 community there's now confusion due to Mr. Bradley's new
3 assertion that there is no partnership. Nobody knows who to
4 write checks to, nobody knows really what the partnership is
5 anymore. So they haven't been able to sell any furniture.
6 Regardless of whatever happens today, there won't be any sale
7 of furniture until this business dispute is sorted out.

8 As to your question, when the website was originally
9 set up, my client, Mark Grattan, took the lead in developing
10 the site, designed the logo. At the time, there was no
11 content, so he mirrored Vidivixi with his site so they could
12 have a presence.

13 Today, it's not that Vidivixi points to him but his
14 site points to them because he is the face of Vidivixi, he is
15 the person who has attended every meeting --

16 THE COURT: "He," Mark Grattan?

17 MR. RAO: Yes. He has created the contacts, the
18 network, and he has designed all the furniture. It is true
19 that Mr. Bradley has financed a good portion of that but he's
20 done so as a silent partner, both in the legal sense and in
21 literally not responding to emails and being silent. He has
22 simply not put in the work and the effort and the sweat that my
23 client has. It's a very typical arrangement, that one partner
24 provides financing and another partner provides sweat equity.

25 I would also add that I have looked at documents

F9LKVIDM

1 definitely showing that at the inception of this partnership
2 Mark Grattan donated two of his designs to the partnership in
3 lieu of a cash donation. So there was a
4 sweat-effort/intellectual property, I would say, donation to
5 the partnership. It's very clear they were partners, from
6 their own statements to third parties.

7 THE COURT: The plaintiff says that there were these
8 invoices which they have attached which were payable to
9 Vidivixi and, so far as the plaintiff knows, those invoices
10 were then paid to Mark Grattan.

11 MR. RAO: Yes, your Honor. As I understand it, the
12 plaintiff took a hard drive out of Mark Grattan's workshop,
13 accessed many of his personal files without his permission, and
14 did find invoicing with the logo Vidivixi. Mark Grattan, of
15 course, has an independent design practice. He has become so
16 identified with Vidivixi that he has often identified himself
17 as Mark Grattan of the Vidivixi partnership, much as a musician
18 when they play with a different band might identify themselves
19 by their stage name. I don't think it was any more or less
20 than that.

21 I wish that Mr. Bradley had simply attempted to
22 negotiate with Mark. What in fact happened was, as soon as
23 Mark sent a proposal to Mr. Bradley, the next day he began
24 sending legal demand letters and would not negotiate at all.

25 THE COURT: You say that until this case is decided,

F9LKVIDM

1 there will be no sales. What does that mean? No sales of
2 what?

3 MR. RAO: Well, there's currently furniture being held
4 in the showroom known as the Colony. That furniture has not
5 been sold. I believe what triggered this entire dispute were
6 sales inquiries that came in. This necessitated some formal
7 partnership agreement. Rather than negotiate that agreement,
8 petitioner has filed for a TRO. When I say there will be no
9 sales, obviously I received papers Saturday at midnight and
10 Sunday at 5:00 p.m., so I have done what inquiry I can, but
11 based on my inquiry within the marketplace for high-end
12 furniture, design people are not willing to execute on sales
13 orders until they know who they should be paying.

14 THE COURT: So does that mean that you agree that
15 there will be no sales under the Vidivixi mark until the
16 preliminary injunction is decided?

17 MR. RAO: That's my understanding, your Honor. As a
18 practical matter, there can't be and my client is happy to
19 abide by a no-sale until preliminary injunction is decided.

20 THE COURT: Okay.

21 You've seen the order to show cause for preliminary
22 injunction --

23 MR. RAO: Yes, your Honor.

24 THE COURT: -- with the temporary restraining order?
25 Have you gone through the individual paragraphs?

F9LKVIDM

1 MR. RAO: I have, your Honor.

2 THE COURT: So, which paragraphs do you object to?

3 MR. RAO: If the Court will permit, I actually left my
4 copy on the bench.

5 THE COURT: Sure.

6 MR. RAO: I'll get it. Thank you.

7 THE COURT: Thank you.

8 MR. RAO: Your Honor, at a higher level, I think what
9 I am trying to say is that the request for relief is based on
10 several serious misstatements of fact. But to address your
11 specific question:

12 I believe petitioner wants to enjoin my client from
13 any use of the Vidivixi mark. Currently, he has the domain
14 Mark@Vidivixi.com, which petitioner has not only served papers
15 to him and has corresponded with him at, he corresponds with
16 others as Mark@Vidivixi.com. It's effectively shutting down
17 his ability as a partner in this business to pursue any
18 business if he cannot use the email Mark@Vidivixi.com.

19 THE COURT: So --

20 MR. RAO: So that would be 3(a). That would also be
21 3(b)?

22 THE COURT: Yes, but the temporary restraining order
23 really is on page 4, ordered that --

24 MR. RAO: So -- sorry, your Honor. Paragraph (a) and
25 paragraph (b), with the understanding that that furniture has

F9LKVIDM

1 not been sold and is not going to be sold.

2 THE COURT: So you object to paragraph (a)?

3 MR. RAO: Yes, your Honor.

4 THE COURT: Okay. And (b) is moot?

5 MR. RAO: Yes, your Honor.

6 I think one of the issues with (c) is, I'm not
7 entirely clear what it is that petitioner is talking about. At
8 least from my reading of their papers, there's no factual basis
9 for the assertion that my client would destroy the mark. Since
10 he is currently in a partnership with Mr. Bradley, it would
11 actually be irrational for him to cause harm to the Vidivixi
12 mark. It's as much his identity and also petitioner's.

13 So I believe my objection to (c) is, it's too vague
14 for me to understand what conduct they're referring to.

15 MR. PEK: Your Honor, I'm willing to waive (c) and
16 strike that if it will facilitate a more expeditious, narrower
17 resolution of the issues that are actually at bar, many of
18 which my adversary has just noted upon.

19 THE COURT: Okay. So the parties agree to strike (c),
20 the parties agree to strike (b) as moot.

21 Okay, (d)?

22 MR. RAO: With respect to (d), I don't think anyone
23 has a problem with the status quo. Mark Grattan has always
24 been the administrator of the domain. Again, I really don't
25 understand (d), I can't agree to that, I have to object to

F9LKVIDM

1 that.

2 THE COURT: Okay. We will take that up.

3 All right.

4 MR. RAO: Paragraph (e), your Honor, is a somewhat of
5 a mirror of paragraph 3(b), that I pointed out earlier. As I
6 said, Mr. Grattan is a partner of Vidivixi, he interacts with
7 the entire design community as a partner of Vidivixi, and
8 paragraph (e) would effectively stop him from doing what he
9 does as a design professional.

10 THE COURT: Okay.

11 MR. RAO: And as I said before, paragraph (f) prevents
12 him from using a business email, which petitioner has consented
13 to for a very long time. In fact, they set up those emails
14 together and, as I said, they have corresponded back and forth
15 on those emails.

16 THE COURT: Okay.

17 MR. RAO: With respect to paragraph (g), I'm not
18 entirely sure what the petitioner is getting at. It's actually
19 petitioner who has attempted to register Vidivixi as a word
20 mark. My understanding of trademark law may be incomplete but
21 I believe that would prevent a third party from registering the
22 domain as a mark.

23 As I've said, I believe that registration is a void
24 application in any event, but with respect to paragraph (g), I
25 can represent that my client has no desire at this point to

F9LKVIDM

1 register a mark until this dispute has been resolved. To the
2 extent that that's what (g) is getting at, the trademark
3 registration, we can agree to that.

4 THE COURT: Okay.

5 MR. RAO: And then with respect to paragraph (h),
6 again, in light of the fact that this is a partnership, it's
7 unclear what unfair competition is referring to. I actually
8 don't know how to respond to that except to say that if there
9 were any sort of proceed or sale from Vidivixi -- and there has
10 been none to date -- I have to believe my client would agree to
11 inform petitioner. And this is separate from the five pieces
12 of furniture which we have agreed are not going to be sold
13 until this is resolved, but if the issue is some suspicion that
14 he has somehow sold under the name, we can clear that up by
15 saying that any sales have to be agreed to, until this is
16 resolved.

17 Paragraph (i), again, is not a preservation of
18 status quo; it's actually an extraordinary request to undo the
19 status quo, namely, the partnership. And I am going to object
20 to that as well.

21 THE COURT: Okay.

22 MR. PEK: Your Honor, if I may respond to a few
23 assertions that my adversary has put on the record?

24 THE COURT: Yes, yes.

25 MR. PEK: First of all, it is well settled trademark

F9LKVIDM

1 law that you need not be registered in order to obtain
2 protection as a trademark.

3 THE COURT: I'm sorry, could you speak into the
4 microphone.

5 MR. PEK: Forgive me, your Honor.

6 Vidivixi --

7 THE COURT: You can sit down.

8 MR. PEK: Thank you, your Honor.

9 It is well settled that a trademark need not be
10 registered or filed or applied for registration on the
11 principal or supplemental register with a USPTO in order to
12 enjoy the benefits provided by the policy, the unfair
13 competition upon which the Lanham Act is based. There are
14 countless trademark infringement litigation between
15 unregistered marks. A trademark is a source identifier.

16 My client, prior to ever joining up in whatever
17 capacity it was -- and I respectfully and firmly submit that
18 there is absolutely no writing or indication or agreement
19 confirming or indicating that these individuals are partners,
20 and that in the absence of such a writing the partnership law
21 dictates that profits follow losses and that losses are to be
22 shared 50/50.

23 So before we talk about any sales, which I will take
24 at face value, the representation of my adversary that there
25 were none, then in order to ascertain the profit, of course,

F9LKVIDM

1 you need to first understand the expense, which has been
2 entirely from my client's out-of-pocket investment, capital
3 contribution, expense, however you'd like to cast it.

4 To suggest that the registration or the application
5 and filing of an ITU application by my client, who has plainly
6 indicated on the registrar that Francis T. Bradley is the
7 owner, I do see that the legal entity was indicated a limited
8 liability company, but there's no name given. That was, in my
9 understanding, an error on the part of my client, but it does
10 not remove Vidivixi from appropriate trademark protection.

11 But for my client bumping into, as I understand it,
12 Mr. Grattan -- who was a former colleague, friend and peer at
13 the Pratt Institute -- at a wood shop in Sunset Park,
14 Mr. Grattan never knew what Vidivixi was, and yet it was an
15 enterprise, a vision and a business in the making prior to
16 Mr. Grattan's involvement. I will not deny, and neither will
17 my client, that Mr. Grattan absolutely did participate in a lot
18 of what Vidivixi did, and a lot of what they have achieved in
19 the way of critical acclaim and awards; for instance, the
20 Architectural Digest expo this past March. That does not
21 entitle him to make sales under the Vidivixi name without
22 apprising my client.

23 And no matter what you want to call this relationship,
24 whether it's a freelance independent contractor or partnership,
25 if it is a partnership, then clearly that highest punctilio of

F9LKVIDM

1 loyalty and honor, as Judge Cardozo, in the case of Meinhard v.
2 Salmon, first articulated has been breached with no remorse and
3 in the most brazen and strident manner.

4 I also have to accept, looking at -- well, first,
5 looking at any of the invoices which bear the mark Vidivixi at
6 the top as a letterhead, if you will, all payments are to be
7 made directed specifically and unequivocally to Mark Grattan.
8 That simply doesn't comport with any characterization of the
9 relationship, as my adversary would have the Court believe.

10 More to the point, I look to an email which is taken
11 from my client's server, and but for it being sent to
12 Mark@Vidivixi.com, we would not have access to that server,
13 which, it's been known all along, both Francis and Mark, in
14 addition to Francis' cousin, Kyle Bradley, who helped set up
15 the domain name, of course, had access to, and confirming that
16 Mark had received payment for at least one piece of furniture,
17 for some four-figure amount.

18 I did not Bates stamp, I did not have time, but the --

19 THE COURT: What exhibit?

20 MR. PEK: It's Exhibit 8. Page 15, page 15, subject
21 regarding invoice attached. And it's from Mark Grattan to a
22 gentleman by the name of Hymie Brunette. I have redacted all
23 sensitive information, routing numbers and such, as the two
24 exchanged emails --

25 MR. RAO: I don't see any redactions.

F9LKVIDM

1 THE COURT: I don't see a page 15.

2 MR. PEK: It's the 15th page of Exhibit 8.

3 THE COURT: I have Exhibit 8. It only has five pages.

4 MR. PEK: Well, your Honor, I will take fault for
5 that, but I'm positively certain that all of the highlighted
6 emails that were red-flagged for me and my client, and
7 therefore we were going to bring to the Court's attention, have
8 been highlighted and hand-selected.

9 THE COURT: Okay.

10 (Pause)

11 THE COURT: This is Exhibit 7.

12 MR. PEK: Forgive me, your Honor. As I explained to
13 Mr. Fletcher, when contacted following my submission of the
14 order to show cause papers to your Honor's law clerk -- I
15 believe his name is Matthew Ferrara, I don't want to get the
16 last name wrong -- I had to confess to Mr. Fletcher that I had
17 submitted to the Court my only copies of the
18 order-to-show-cause papers. In my limited experience of
19 submitting similar papers requesting similar relief from the
20 Southern District, it's been my experience that I would receive
21 a phone call or often wait in the corridor while the judge
22 would sign and conform an order to show cause, instructing us
23 whether bond needed to be posted, granting certain relief,
24 denying certain relief and the method and manner of service, by
25 which date. Instead, I got a contacted by Mr. Fletcher, so I

F9LKVIDM

1 explained to him that I am going to have to put these 12
2 exhibits back together by memory.

3 That will explain any discrepancies as between the
4 page numbers, but I give you all assurances, under penalties of
5 perjury, that to the T, to the page, they have been exactly
6 reproduced.

7 THE COURT: Okay. So I have two copies before me, I
8 have the original and I have the courtesy copy.

9 By the way, the general practice, my understanding,
10 for judges in the court, and my practice invariably, is if you
11 give me an order to show cause, particularly one which contains
12 a temporary restraining order, I don't sign an order to show
13 cause with a temporary restraining order without notice to the
14 other side. So you have to provide notice to the other side,
15 you give a copy of the papers to the other side, and then you
16 come in, so you have -- my understanding is that the general
17 practice of judges in the court is, we don't sign TROs without
18 notice to the other side. So you give the papers to the other
19 side and then you come in when the judge says I'll hear you on
20 the order to show cause with the temporary restraining order,
21 we'll set up the date for the preliminary injunction, and you
22 can explain why pending a decision on the preliminary
23 injunction you should take a temporary restraining order.

24 It would be the exception rather than the rule that
25 the judges of the court sign TROs without notice to the other

F9LKVIDM

1 side.

2 MR. PEK: Understood, your Honor. However, I can --
3 well, I don't want to undermine your Honor's rules, by which I
4 assure you plaintiff and counsel will abide. However, it's my
5 personal understanding, having spoken with the clerks in room
6 200 and having done this before, that so long as you provide
7 the other side with one hour's notice, which I did, of your
8 intention to appear at this courtroom at this time, to present
9 for the Court an order to show cause seeking X, Y and Z relief,
10 that that is sufficient.

11 I understand completely your Honor's position, and it
12 is not discordant with my experience; it is something of form
13 over substance. For instance, Judge Swain, the late Judge
14 Sprizzo and Judge Rakoff, from memory, I can recall, denied
15 most of our relief, set a hearing --

16 THE COURT: Fine. If that's what you want me to do,
17 having come in, that's not a problem; I will strike all of the
18 requests for temporary relief and set a prompt hearing on the
19 preliminary injunction. The reason for calling you in is to
20 give both sides the opportunity to talk about the temporary
21 restraining order. But if you prefer the other practice,
22 that's not a problem.

23 MR. PEK: Understood, your Honor. Respectfully, I do
24 not prefer the other practice and I seem to have been mistaken,
25 so I apologize for that.

F9LKVIDM

1 THE COURT: So, we were really at, you wanted to show
2 me Exhibit 7, I think. And the email that you were referring
3 to is: "Hi, Lailani. Awesome meeting. Thanks for giving me
4 the time. Attached is the product info for the pieces you were
5 most interested in"? Is that it?

6 MR. PEK: It's the one immediately preceding that
7 email, which I think, on balance, also tends to suggest a sale
8 has been completed. But it is dated Wednesday, September 2nd,
9 from Mark Grattan, Info@MarkGrattan.com, to
10 HymieBrunette@gmail.com. "Yes!" in response to the immediately
11 preceding email from Mr. Brunette: "Hey, just wanted to make
12 sure you got payment. Hit me back when you can."

13 THE COURT: Okay. What do you do with Mark Grattan's
14 argument that you all actually had a partnership?

15 MR. PEK: In the event that this Court does find the
16 partnership in fact or implied in fact was the relationship
17 between the parties, I find categorically that Mr. Grattan has
18 breached every fiduciary duty that comes attendant to that.
19 And I don't mean to be academic about this, but I will cite
20 Meinhard v. Salmon, where Judge Cardozo did first note that, if
21 we are to be partners in this country, then we owe each other
22 that highest of fiduciary duties.

23 And to not advise your partner of any of these
24 queries? My client has not recognized a single cent in sales
25 at all. And I would share Mr. Rao's expectation that if they

F9LKVIDM

1 were partners, that Mr. Grattan would of course inform his
2 partner of a potential sale. But that was not the case.

3 I do also want to note in the way of irreparable
4 harm -- and this is the trademark aside and the partnership
5 aside -- that in the Second Circuit, injuries to one's
6 commercial reputation has been held to be sufficient as
7 evidence of irreparable harm. Upon information and belief,
8 although I cannot produce the email itself, my client has been
9 led to believe by other sources that the defendant has sent out
10 inflammatory and defamatory statements, emails, to others
11 indicating that he is on a quote-unquote rampage, that he has
12 stolen things --

13 THE COURT: But that's not a claim in the current
14 complaint.

15 MR. PEK: No, it is not. However, we of course
16 reserve the right to amend the complaint --

17 THE COURT: Sure.

18 MR. PEK: -- but, most importantly, we are looking
19 forward to a hearing on the preliminary injunction, your Honor.

20 THE COURT: Okay. The defendant says no sales are
21 going to be made on the Vidivixi site because the industry
22 knows that there is a dispute between the plaintiff and the
23 defendant. Do you agree with that?

24 MR. PEK: I'm sorry, your Honor, could you repeat that
25 one more time?

F9LKVIDM

1 THE COURT: The defendant says, the industry knows
2 that there is a dispute over the name Vidivixi and there are no
3 sales that are going to be made with respect to that site until
4 this is decided. My question was: Do you agree with that?

5 MR. PEK: I disagree with that, based on inter alia
6 the week-old, ten days old emails indicating there were such
7 sales.

8 THE COURT: No, no, no, but for the period of time --

9 MR. PEK: Right now?

10 THE COURT: -- right now from now until the time that
11 the preliminary injunction is decided.

12 MR. PEK: Yes, I will accept that representation from
13 the defendant, although I am not in a position, nor do I think
14 is the defendant, to say as to what the community is that has
15 the perception of Vidivixi or whether there is a dispute beyond
16 Ms. Lin, who houses the five pieces at issue.

17 Your Honor, if I may address one final point relevant
18 to the order to show cause?

19 THE COURT: Yes, sure.

20 MR. PEK: As your Honor is aware, in addition to
21 likelihood of success on the merits and demonstration of
22 irreparable harm, the Federal Rules and case law and the Lanham
23 Act and progeny have made plain that, when relevant, a balance
24 of the hardships or balance of the equities is to be considered
25 for purposes of (a) in the first instance, granting the

F9LKVIDM

1 requested TRO or, in other instances, in setting the amount of
2 a bond. The final exhibit to my client's affidavit, which was
3 also culled from our or my client's email server, from the
4 Vidivixi server, tend to indicate that in fact Mr. Grattan does
5 intend to move on and has engaged other -- or has been engaged,
6 rather, as a consultant working for other third parties
7 interested in Mr. Grattan alone.

8 I would respectfully submit that in addition to
9 further supplement, my response to your question before as to
10 defendants' representation as of now about Vidivixi sales being
11 made, Exhibit 12 gives me further confidence in my expectation
12 that they will not be, but, more to the point, that no undue
13 harm or no -- the balance of the hardships in this case --
14 forgive me; I'll put it differently. In the event that this
15 Court does decide that a temporary restraining order to any
16 effect concerning Mr. Grattan is warranted, we respectfully
17 submit that due to the new business ventures, among other
18 things, such as my client's venture capital investment but
19 mostly, to what we know, has been a new business opportunity, a
20 new job, a new gig, if you will, with an entity by the name of
21 Friends and Family, with whom, upon information and belief,
22 Defendant Mark Grattan has entered into a consulting agreement,
23 that under the circumstances no bond is warranted, in part
24 because he will suffer no harm from this relief being issued,
25 as he has other going concerns presumably or ostensibly, based

F9LKVIDM

1 upon our review of our own records.

2 THE COURT: In the request for the temporary
3 restraining order, the first request, to relinquish the rights
4 to the five pieces, that's moot, is it not, because those are
5 the five pieces that Ms. Lin has? Right?

6 MR. PEK: Those are the five pieces that Ms. Lin has.
7 And I think it will have to be an issue either for the parties
8 to settle an order, if they can come to an agreement, so as not
9 to split the baby, for lack of a better word, of those five
10 beautiful pieces, those show pieces, but it will be an issue of
11 fact for the Court to determine who and in what proportion the
12 parties or which of the parties own each of those five pieces.

13 MR. RAO: Your Honor, can I clarify a few things?

14 THE COURT: Yes, go ahead.

15 MR. RAO: First, I believe that petitioner is kind of
16 trying to have it both ways here. Mark Grattan is an
17 independent designer who did enter into a partnership with
18 Francis Bradley. The complaint seems to allege that he is an
19 independent contractor, in which case, he would own everything
20 he designed, including the logo and the furniture which he
21 designed, absent any work-for-hire agreement. They seem to
22 want him to be an independent contractor when it suits them and
23 want him to not be when it suits them.

24 The facts are very clear because Mr. Bradley signed
25 contracts stating both of them are cofounders. The facts are

F9LKVIDM

1 also very clear that Mr. Bradley never paid my client a salary,
2 never signed a noncompete or enforced a noncompete, and there
3 is no understanding that Mr. Grattan is not allowed to sell
4 furniture as himself. This is a partnership under the brand
5 name Vidivixi, it's a project between the two of them.

6 Mr. Bradley presumably has other going concerns and Mr. Grattan
7 presumably has other going concerns, and I don't, frankly, see
8 the relevance of that.

9 As to the trademark, which seems to be coming up a
10 lot, I just want to very simply state that when Mr. Bradley
11 filed for a trademark there was no such thing as Vidivixi LLC.
12 Vidivixi LLC was a creation of less than a month ago. It
13 appears to have been a creation simply used as a tool to
14 threaten Jean Lin and my client to give up property and
15 intellectual property that, as I've already stated, Mr. Grattan
16 created. There simply was no LLC a month ago.

17 THE COURT: Okay. I'll have a hearing on the
18 preliminary injunction on October 5, 2015, at 9:00 o'clock in
19 the forenoon. I don't see any provision in the proposed order
20 to show cause for responsive papers, but responsive papers are
21 due September 28, 2015; reply papers are due September 30,
22 2015.

23 The parties are welcome, if they want, between now and
24 October 5, to take any depositions that they wish. I'll have a
25 final conference with you on October 2 at 4:30 p.m., in

F9LKVIDM

1 preparation for the preliminary injunction. I'm prepared to
2 put aside whatever time is necessary on October 5 and October 6
3 for the preliminary injunction hearing, if you want an
4 evidentiary hearing. If you do, I'll give you time limits, so
5 that two days should be ample for the preliminary injunction
6 hearing.

7 Service of this order is being made in court, so
8 personal service is not necessary.

9 With respect to the temporary restraining order, the
10 defendant represents that they have no intent to register the
11 mark or domain www.Vidivixi.com.

12 With respect to the other requests for a temporary
13 restraining order, those requests are denied.

14 Given the dispute among the parties as to the right to
15 use Vidivixi, I could not make a determination of likelihood of
16 success based upon the papers and arguments at this time.
17 Moreover, there is no showing of irreparable injury between now
18 and the time when the preliminary injunction would be decided.
19 It is unlikely that there are going to be sales, and even if
20 there are sales, that the amount of those sales would be very
21 substantial. In any event, the amount of those sales can be
22 readily determined.

23 So I will leave in paragraph (g) on the request for a
24 temporary restraining order and I will strike the other
25 paragraphs of the temporary restraining order. There is no

F9LKVIDM

1 necessity for a bond, in view of the fact that the defendants
2 have no desire, no intent, to register the domain name in any
3 event, and therefore there are no possible damages that result
4 for which a bond would be necessary.

5 Has the plaintiff served the other copy on Ms. Lin and
6 her lawyer? I want to make sure that she gets copies of this,
7 in view of the fact that I am not requiring personal service; I
8 just want to make sure that they are served. And I will make a
9 copy of this order and give it to all of the parties here now.

10 MR. PEK: Ms. Lin has not been served other than by
11 through email. I have a full courtesy copy, with a blank order
12 to show cause, to accompany your Honor's conformed order to
13 show cause that I can provide Ms. Lin today.

14 THE COURT: Okay, great. I'm going to give you the
15 copy of the signed order to show cause now.

16 Anything else?

17 MR. PEK: One final question: With respect to the
18 depositions that, given the short time span, I suspect, so long
19 as notice is provided to all parties of any depositions --

20 THE COURT: You can get expedited depositions.
21 Plainly, you don't need to give ten days' notice.

22 MR. PEK: Okay.

23 And for purposes of witness testimony at the
24 preliminary injunction hearing itself, need we provide a
25 witness list? Or is that in your Honor's local rules?

F9LKVIDM

1 THE COURT: You should provide a witness list. The
2 witness list should be provided prior to the final conference
3 on October the 2nd.

4 MR. PEK: Thank you, your Honor.

5 MR. RAO: Thank you, your Honor.

6 THE COURT: Okay.

7 (Adjourned)